THE LAW OF MARITAL PROPERTY IN CZECHOSLOVAKIA AND THE SOVIET UNION

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THE LAW OF MARITAL PROPERTY IN CZECHOSLOVAKIA AND THE SOVIET UNION

I. Introduction

The contemporary law of marital property adopts either the separation of property approach or the community property approach in dealing with the subject. The great majority of European countries apply the system of separation of property and leave it to the spouses to make their own arrangements by marriage contracts. The community property concept is followed by France and Spain, but both systems allow the spouses to provide otherwise.

The situation in the United States is more complex, for both systems are used there depending upon the cultural background of the original settlers of the state in question. For instance, those American states which originally derived their law from English laws apply the principle of separation of property.[1/] Accordingly, in those American states which originally derived their law from French and Spanish law (areas that once formed part of the French or Spanish dominions including Louisiana, Texas, New Mexico, Arizona, California, Nevada, and Washington) community property concepts still survive. Pursuant to this approach, a community of property of husband and wife is created upon the

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1/ E.g., New York Domestic Relations Law §50, General Obligations Law §3-201; Illinois Revised Statutes 68-7-10. The nucleus of this approach is embodied in English Common Law which applied this principle to unmarried women, but upon marriage all personal property of the wife was vested in the husband while real estate held by the wife prior to her marriage continued to be vested in her. 2 W. Blackstone, Commentaries, 433 (Tucker Ed., Philadelphia, 1803). The present approach of separation of property was thus obtained upon removal of this disability by legislation (Married Women's Property Acts: Mississippi 1839, Maine 1844, etc.). Consequently, a married woman, as far as her property is concerned, retains the position of a single woman.

celebration of a marriage; and, upon dissolution of this union, the property is divided equally between the spouses.

The object of the community property approach is to give better protection to the wife's share in the community. Under present conditions, however, the principle of separation of property may be more advantageous to the wife.[2/] With the full emancipation of married women, the system of separation of property enables the wife to retain full control of her possessions.

It should be noted that none of the countries applying either separate or community property actually apply it in the purest form, but they combine features of both systems or offer spouses two or more alternatives. As a result of these adaptations, there are virtually as many systems as there are countries.

Czechoslovak law presently subscribes to the law of community property similar to that applied in the Soviet Union. This law was adopted under Soviet influence.

II. Czechoslovak and Russian marital property law prior to the adoption of the community property system

Both Czechoslovakia and Russia subscribed to the system of separation of property prior to the introduction of the Soviet community property system by the Communist Party.

2/ In re Estate of Crichton, 20 N.Y.2d 124, 281 N.Y.S.2d 811, 228 N.E.2d 799, at 807 (N.Y.Ct.App. 1967) deciding the question whether the community property laws of Louisiana or the separate property laws of New York should be applied, Judge Keating remarked that depending upon the nature of the property in the estate a surviving spouse under New York law might well be entitled to receive a greater portion of the over-all estate than under the community property system.

A. Czechoslovak law

The marital property law applicable in Czechoslovakia prior to January 1, 1950 (the date of introduction of the community property system) had a long-standing tradition. It grew from ancient origins, enjoyed centuries of use, and eventually took the form of a legislative provision in the former Kingdom of Bohemia which became one of the nations forming the Austrian Empire. In Slovakia the law continued to operate in the common-law form.[3/]

1. Czech law

Articles 1233-1241 of the Austrian Civil Code of 1811[4/] consolidated Czech laws on the subject. Articles 1233 and 1237 expressed the fundamental principle of separation of property. Accordingly, the celebration of marriage on its own did not bring about the creation of community property, but the marriage contract could form the basis for the property agreement. If the partners failed to create such a contract, the principle of separation of property applied.

a. The principle of separation of property

The political and economic individualism of the late 18th and early 19th centuries was expressed in part in the principle of separation of property. Property was understood to include not only the corpus but also its management and the right of its alienation, so that each spouse was entitled to freely manage and dispose of his property without the interference of the

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3/ Modern Czechoslovakia was formed in 1918 by combining the former Kingdom of Bohemia (the western part of the country) with Slovakia and Sub-Carpathian Ruthenia (the eastern part of the country). Immediately after World War II, Sub-Carpathian Ruthenia was forcibly annexed by the Soviet Union.

4/ Austrian Civil Code of June 1, 1811, No. 946, Collection of Laws.

other spouse. This freedom could have been affected by a marriage contract, but if the marriage contract failed to provide for a particular eventuality, each spouse was free to make his own dispositions concerning the property unless it was shown that the point was, indeed, covered by a contractual provision. The burden of proof fell on the claimant.

It followed that there was no presumption as to title to marital property. In case of doubt, each spouse had to prove title to the property he brought into the marriage. On the other hand, property acquired during the marriage was presumed, in case of doubt, to have been acquired by the husband. Each spouse was free to enter into contracts concerning his or her property and was bound by them without obligating the other spouse in any way. In order to bind both spouses, they had to obligate themselves jointly or in common in accordance with provisions of the Civil Code governing the matter. 5/

Property acquired during marriage was also acquired separately by either spouse and belonged exclusively to that spouse. Property acquired jointly or in common was held in co-ownership. Co-ownership of spouses created, however, some uncertainty regarding title to chattels since most of such objects, especially those acquired for use in the household, were acquired by common understanding of the spouses from funds of one or the other or from their mixed funds. Similar uncertainty was felt with respect to family savings. The family appears as a unit to third persons making it impossible for the latter to determine title to individual items of personal property. The consequence flowing from this uncertainty as to title especially affected creditors who were unable to

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5/ Obligations in common were governed by arts. 888-890 of the Civil Code, and joint obligations by arts. 891-896 of the Civil Code. These rules applied to all parties irrespective of their marital status.

identify the respective shares of personal property owned by one or the other spouse or by them jointly. The second sentence of article 1237 of the Civil Code was designed to alleviate the problem. It set up a presumption that any property acquired by the spouses during marriage was, in case of doubt, acquired by the husband.[6/] The presumption was rebuttable by actual proof, and it did not apply to jewelry which, pursuant to article 1247, was understood to belong to the wife. It also could not have affected real estate since title to real estate belonged to the persons listed as owner in the register of land records.

The purpose of article 1237 was purely to protect creditors and not to make the husband superior to the wife. The husband's title was preferred to that of the wife because of the known economic fact that the husband is the main provider of the family. The suggestion made by some contemporary Czechoslovak writers that it was meant to further the superiority of the husband over the wife is not accurate, although superficially it lends credence to such a view.[7/]

Another consequence of the application of the principle of separation of marital property was that the spouses were free to contract one with the other concerning their property.

6/ Supra note p. 3.

7/ Compare, e.g., J. Štěpina, Rodinné Právo 41 (Praha, Orbis, 1958).

b. The management of the wife's or the husband's property

The Civil Code regulated the management of the wife's property in articles 1238-1241. Through the provisions of article 1238, the husband was invested with the management of his wife's property by authority of the law so long as the wife did not make it known that she desired to manage her own property. This authority of the husband derived from article 91 of the Civil Code which imposed on the husband the duty to represent her in all matters.[8/] "Management" was understood to mean the day-to-day administration of the property without any right to dispose of the substance. If the husband wished to dispose of the substance, he was required to obtain a special power of attorney in accordance with article 1008 of the Civil Code. Through the provisions of article 1239, the husband had to manage his wife's property for free and had no claim to expenses or compensation for any accidental loss he incurred in its management. On the other hand, he was not required to give an accounting of his management, and thus it was possible for him to keep the proceeds. These proceeds, however, were intended for the benefit of the family. The possibility that the husband would keep the income of his wife's property did not amount to a usufruct in his wife's property but was based on article 91 of the Civil Code. The wife could terminate the husband's management at any time, either expressly or tacitly, by taking the management in her own hands.

8/ The chief duty of the husband imposed on him in art. 91 consisted of representing his wife in dealings with public authorities and in legal proceedings. Art. 1238 extended this duty also to the management of the wife's property unless she preferred to handle it herself.

In addition to article 1238, article 1241 of the Civil Code carried other provisions concerning the management of the wife's property. Pursuant to these provisions, the wife was entitled to terminate the husband's management of her property at any time for good reason. The termination became effective as soon as the husband was notified. No special form was required and the notice of termination could even be given orally. This provision was intended to enable the wife to terminate her husband's management of her property entrusted to him by a marriage contract since, pursuant to the provisions of article 1238, she could have terminated his management of her property entrusted to him by the provision of the law. Good reasons included some incapacity of the husband, his inability to manage the property because of an overly heavy work schedule, or a change of residence where the management required the presence of the manager.

In order to maintain equality between the husband and wife, article 1240 of the Civil Code empowered the spouses to make arrangements for the management of the husband's property by the wife through a marriage contract. But quite apart from a marriage contract, the husband was permitted, at any time, to hand over the management of his property to his wife. In both these cases, unless otherwise provided, the wife was required to give an accounting of her management, but she was entitled to her expenses and to compensation for accidental loss.

c. Marriage contracts

Pursuant to provisions of articles 1233-1237 of the Civil Code, the spouses were free to enter into a marriage contract of any sort so long as it was not impossible and was not offensive to public mores. The Civil Code envisaged the setting up of four different types of marriage contracts although

the spouses were free to make their own arrangements. These included all community property in existence at the celebration of the marriage, community property acquired during marriage, community of both these types of property, or community of real property only. Where the marriage contract dealt with present or future property, an inventory of the property had to be made pursuant to provisions of article 1178 of the Civil Code. Unless otherwise provided in the marriage contract, each spouse was free to dispose of his property during marriage since article 1234 provided only for the community of property at the time of death.

If the marriage contract provided only for community property, it meant, pursuant to the provisions of article 1234, only a community at the time of death. The effect of such an agreement was that the community property of the spouses at the time of death of a spouse was divided into equal shares, one would accrue to the surviving spouse and the other would descend to the estate of the decedent. If the spouses died simultaneously, article 1234 did not apply.

2. Slovak law

Although Czech law was codified, Slovak law was not. It remained in a common-law form modified by occasional statutes and was proclaimed by decisions of the courts. As to its form and system, it resembled the common law of England.[9/]

9/ Until 1918, when it joined the Czechoslovak Republic, Slovakia was a part of Hungary and had its law in common with that country. Consequently, Hungarian law and Slovak law were one. Slovak law was founded on Verboczy's Tripartitum of 1517, a law book which was an authoritative collection of law and which in Slovakia and Hungary enjoyed an authority even greater than Blackstone's Commentaries in America. The common law consolidated in the Tripartitum was further developed by court decisions. Slovak law has taken a separate course since 1918.

According to Slovak law, each spouse enjoyed full freedom of ownership and disposition of his property. Slovak law subscribed to the system of separation of property. It distinguished between the separate property of each spouse and the property they acquired during marriage.

a. Separate property

The separate property of each spouse was property brought into the marriage and acquired by gift or inheritance and included property such as clothing, jewelry, etc., which by its nature belonged to one of the spouses only. Also included was property which by decision of the spouses belonged to each of them as separate property and any increase in the value of the corpus of separate property. Unless the spouses provided otherwise, each spouse could use and manage the other's separate property and was required to protect it as his own, and he was liable for any damage or loss. Either spouse could use the income or produce of the property for the benefit of the family without any accounting unless otherwise agreed upon.

b. Property acquired during marriage

The treatment of property acquired by the spouses during marriage depended on the standing of the spouses in society. One rule applied to nobility, gentry, assimilated persons, and another to commoners.

c. Property of nobility, gentry, and assimilated persons

Persons assimilated by the nobility and gentry were persons who earned their living by following a career in science, the arts, or by holding public office. They included physicians, scientists, lawyers, university-educated public servants, officers of the armed forces, persons holding high public office,

and the like. Property acquired during marriage by these individuals was understood to have been acquired by the husband. The presumption applied that the wife of a husband so well placed in society would not be required to earn her own living by paid work in employment, business, or another capacity. In consequence, the husband was the owner of such property and could dispose of it inter vivos and by will. The wife could, of course, prove otherwise with respect to any particular property acquired during marriage, and such property was then governed by the rules applicable to co-acquired community property. This concept also applied in the case of the income and produce of the wife's separate property which became co-acquired community property during the marriage. The spouses were also free to provide for the application of the system of co-acquired community property by a marriage contract.

d. Property of commoners

Commoners were people who earned their living by manual and clerical work, and the property they acquired during marriage was governed by the rules of co-acquired community property.[10/]

Co-acquired community property consisted of all property acquired by work and savings of the income, produce, or interest of the separate property of the spouses, and of any other property which the spouses determined to be part of such property. Co-acquired community property was managed by the spouse who acquired it, and if it was acquired jointly, by both spouses or any

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10/ Co-acquired community property is not an original institution of Hungarian or Slovak law but was brought into the country by German settlers who upon settling obtained the privilege to be governed by their own law. The law of co-acquired community property developed as a branch of municipal law, applicable in townships.

one of them. It was alienated only by the joint action of both spouses. Debts incurred by either spouse concerning co-acquired community property bound the property. Co-acquired community property ceased upon the dissolution of the marriage and was distributed equally between the spouses. The spouses were free to divide all their co-acquired community property at any time during the marriage, so that they would actually be governed by the principle of separation of property. The purpose of the institution of co-acquired community property was mainly to provide for the surviving spouse (usually the wife) upon the death of the spouse dying first, since the co-acquired community property in existence at the time of such death was then distributed equally between the surviving spouse and the estate of the decedent, irrespective of the individual's actual contribution to the acquisition of the property. Since, as a matter of fact, most of the property was usually acquired by the husband, the distribution favored the wife.

B. Russian law

The law of marital property in Russia prior to the enactment of Soviet community property legislation in 1926 subscribed fully to the principle of separation of property. The legislative provisions were well presented, exhaustive, and clear in their meaning.[11/]

Article 109 of the Russian Civil Code provided for the application of the principle of separation of property. It declared that marriage on its own did not create any community property and that each spouse was entitled

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11/ The Russian law of marital property was governed by arts. 109-118 of the Russian Civil Code. 10 Svod Zakonov Rossiiskoi Imperii, part 1 (St. Petersburg, Russkoe Knizhnoe Tovarishchestvo "Diatel," 1912- [14?]).

to hold and acquire property of his own. Consequently, each spouse could not ıly own but also acquire and manage his property during marriage. The husband had no right to his wife's property or its use and management. Also, the dowry belonged exclusively to the wife unless otherwise provided, but even in the event that it was given to the husband, he was bound to restitute it to the donor or his successors upon his wife's death.[12/] The spouses were, however, free to regulate their property relations in a marriage contract and could thus provide for community property of their own design.

Through the provisions of article 114 of the Russian Civil Code, each spouse could buy, encumber, and dispose of his property freely, in his own name, independently of the other spouse. The wife was thus entitled to engage in business without the permission of her husband. She could own and manage a business establishment or be a partner in a business and could bind herself on bills of exchange.

In order to control the other spouse's property, the spouse had to hold a power of attorney.[13/] Spouses could give each other gifts, sell, buy,[14/] and encumber property one to the other.[15/] A spouse was not liable to answer for the debts of the other unless he bound himself as a stranger.[16/]

12/ Id., art. 110.

13/ Id., art. 115.

14/ Id., art. 116.

15/ Id., art. 117. Arts. 116 and 117 were considered redundant in view of the provisions of arts. 109, 110, and 114, which made each spouse fully independent of the other as far as property was concerned.

16/ Id., art. 112.

Considered in its entirety, the law of marital property in Czarist Russia presents a system of separation of property far ahead of its time. Russian law accomplished a full emancipation of the married woman as far as her property was concerned long before any similar legislation was enacted in the West. The effect of the Russian provisions was to envision the spouses as total strangers with respect to their property. They were thus free to engage in any transaction concerning their property without any interference by the other spouse.

As a contemporary German commentator put it,[17] the Russian law of marital property was vastly superior to many West European laws and especially to that of the German Civil Code which in article 1363 provided for the management and use by the husband of his wife's property brought by her into the marriage as well as of property acquired by her during marriage. The Russian system appeared to female German lawyers as a long desired objective. The German law was eventually modified in 1957 in order to reflect the constitutionally declared principle of equality of the sexes, but even today it does not subscribe fully to the principle of separation of property which operates only if the spouses exclude the system of community of accrued gains in a marriage contract. Unless they so provide, they will be governed by the system of community of accrued gains.[18]

17/ R. Gebhard, Russisches Familien- und Erbrecht 73 (Berlin, J. Guttentag, 1910).

18/ Art. 1363 of the German Civil Code stood unchanged until 1957. Its effect was in doubt, however, since the declaration of equality of man and woman in art. 3(2) of the German Basic Law (German Constitution) entered into power on May 24, 1949. The present wording of art. 1363 dates from the Law on the Equality of Man and Woman in the Civil Code, of June 18, 1957, Bundesgesetzblatt I, 609. It provides that the spouses are governed by the matrimonial regime of community of accrued gains unless they provide otherwise in a [continued]

Similarly, the Russian law was far ahead of contemporary French law. As it stood prior to the end of World War I, French law subscribed to the principle of community property which applied unless the spouses provided otherwise in a marriage contract.[19] The husband alone was in charge of the management of community property and had the authority to sell, encumber, or otherwise dispose of it without the consent of his wife.[20] He also was in charge of the management of the wife's separate property and could dispose of it alone with the exception of her real property for which he needed her consent.[21] Since 1965, however, the wife has been permitted to manage her separate property.[22] The other principles of French law which favored the husband were not affected by the amendment and are still in force.[23]

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marriage contract. By the provisions of art. 1414 of the Civil Code, the spouses are governed by the system of separation of property if they declare in their marriage contract that they do not wish the statutory regime of community of accrued gains to apply to them and fail to make any other provisions. Separation of property is thus optional in Germany.

19/ C. Civ. art. 1400 (1910).

20/ Id., art. 1421.

21/ Id., art. 1428.

22/ Law No. 65-570 of July 13, 1965, changed art. 1428 of the Civil Code to read: "Each spouse has the management and enjoyment of his separate property and may freely dispose of it."

23/ The 1965 modification did not affect the meaning of art. 1400 of the Civil Code although its wording was improved. The new version of art. 1421 made the husband liable for fault in the management of the community property but did not affect the principle of the husband's management of community property.

III. The introduction of the community property system in the Soviet Union and Czechoslovakia

A. Soviet Union

1. The Family Law of 1918

The first Soviet disposition concerning marital property occurred in the enactment entitled "The First Code of Laws Concerning the Registration of Civil Status, Marriage, Family and Guardianship." It was adopted by the All-Russian Central Executive Committee on September 16, 1918.[24/] It developed the principles announced in the earlier decrees on marriage and divorce of December 18, 1917, and on inheritance of April 27, 1918.[25/]

In articles 105 and 106, it continued the previously applicable provisions of the Russian law, and it may have strengthened the rule whereby spouses were free to contract one with the other. The admitted objective of the Soviet legislation was to establish equal and mutual obligations for men and women,[26/] and in this respect it was difficult to make improvement on the Russian rule of full separation of property of spouses. The draftsmen of the Soviet provisions claimed that article 105 carefully protected the economic rights and the private property of the wife against any operation of "bourgeois" and "feudal" discrimination and usurpation. These claims are not persuasive. They also disclosed that article 106 was enacted to strengthen the impact of

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24/ I-i Kodeks zakonov RSFSR ob aktakh grazhdanskago sostoiania, brachnom, semeinom i opekunskom prav [The First Code of Laws of the RSFSR concerning the Registration of Civil Status, Marriage, Family and Guardianship] (Moskva, Izd. Nar. Kom. Iustitsii, 1918).

25/ The Marriage Laws of Soviet Russia 5 (New York, Russian Soviet Government Bureau, 1921).

26/ Id., at 12.

article 105 in order that its intent would not be nullified by private agreement made under pressure of the old customs which operated to reduce the wife's economic rights.[27] No doubt, husband and wife under Czarist law had the same rights. The difference, if any, lies in the emphasis given by the Soviet decree to the principle of separation of property. The Soviet regime promised to enforce this principle with a greater vigor than was done during the rule of the "bourgeois" and "feudal" classes.

The change to community property occurred in the Soviet Union in 1926, and the new Family Code embodying community property provisions became effective on January 1, 1927.[28]

P. Sedugin explains the change to community property as follows:

> The division of property, which had greatly helped to establish equality between the spouses during the early Soviet years, no longer conformed to the principle of equality and, in several instances, it militated against the wife's rights, especially housewives and mothers. By the principle of divided property, the property acquired through the husband's earnings had belonged to him alone. [29]

It is rather surprising that in a relatively short period of eight years conditions would have changed so drastically as to make the Communist Party abandon the principle of separation of property which it hailed as conducive to equality of the spouses in that it protected the wife against

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27/ Id.

28/ The Code of Laws on Marriage and Divorce, the Family and Guardianship was enacted by the Decree of the All-Russian Central Executive Committee made at the Third Session of its XII Convocation on November 19, 1926 (Compiled Statutes of the RSFSR, 1926, No. 82, Sec. 612).

29/ P. I. Sedugin, New Soviet Legislation on Marriage and the Family 12 (Moscow, Progress Publishers, 1973); A. I. Pergament, "Sovetskoe semeinoe pravo" 2 Sovetskoe grazhdanskoe pravo 371, S. N. Bratus, red. (Moskva, Gosiurizdat, 1951); and G. M. Sverdlov, Soviet Family Law 41 (Moscow, Gosiurizdat, 1951).

"bourgeois" and "feudal" discrimination. But conditions changed, indeed, and so did the position of the Communist Party. Large scale nationalization and confiscation of property reduced private property to the bare minimum of personal effects so that the wife was left with no property to protect. Also, now the husband was earning the family income by his work to the exclusion of the wife who, in most cases, stayed at home and took care of the family as there was no work for her outside of the home, and the economy was unable to provide employment for her. The wife thus became utterly dependent upon her husband's income. In the same vein, the Communist Party, while declaring collectivism one of its fundamental principles, found itself in the position of fostering individualism in its support for the "bourgeois" doctrine of separation of property.

2. The Family Code of 1926

The Family Code of 1926 dealt with the spouses' marital property in articles 10 and 13. The change occurred in article 10 which modified the previous article 105, while the former article 106 was absorbed without any change and became article 13.

Under the provisions of article 10, the meaning of the separate property of each spouse has been enlarged by legal doctrine and court decisions to include objects of personal use like clothing, shoes, etc., intended for use by one spouse only, irrespective of whether they were acquired with other than the separate funds of that spouse; property acquired by gift and inheritance, products of his creative energies like paintings, manuscripts, music, sculpture, etc.; and choses in action like a claim for damages in tort for personal injuries suffered by a spouse. Objects of personal use also

included jewelry and luxury items of value, and they belonged to the spouse using them, irrespective of whether they were acquired by that spouse or by the spouses jointly. In case of divorce, the spouse using these objects would still keep them, but their value would have to be considered in the distribution of property.[30/]

The community property of the spouses comprised all property acquired by them during marriage. The individual share of each spouse was only determined upon dissolution of the marriage, by agreement of the spouses in the case of a divorce, and by agreement between the surviving spouse and the heir of the deceased spouse in case of death, or by the decision of a court. In case of judicial distribution, the actual shares were left to the discretion of the court upon considering all the circumstances of the case. An equal division was not required.

While the provisions of article 10 were well understood, a problem arose with respect to article 13 (formerly 106), the effect of which was now very much in doubt. Its admitted purpose in 1918 was to strengthen the principle of separation of property instituted in article 105. Now that separation of property was substituted by the principle of community property, it seemed that article 13 became practically meaningless. The principle of community property was intended to be mandatory, and the spouses were not allowed to modify the provisions of article 10. Any such modifications would run directly against the government objectives to be attained by the institution of community property, and as stated by a contemporary Soviet authority, it could

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30/ Pergament, id., at 394. Decision of August 4, 1928, No. 33512, Civ. Cass. Collegium, Sup. Ct. RSFSR, Sudebnaia Praktika RSFSR, 1928, No. 23, p. 8.

lead to results adverse to the interests of the spouses, of third parties, and of the State.[31/]

The application of article 13 would then be limited to the separate property of the spouses. Its first sentence would then mean that spouses were free to deal one with the other concerning their separate property as they pleased. They would, of course, be free to dispose of such property to third parties. Agreements concerning their separate property would be governed by provisions of the Civil Code.[32/] A special provision to that effect was, however, quite unnecessary in view of the first sentence of article 10, which declared all pre-marital property of the spouses to be their separate property and which implied their unlimited right of disposition of such property.

The second sentence of article 13 could not, however, be salvaged and became superfluous.[33/]

It thus appears that while the Soviet draftsmen modified article 105 of the 1918 Family Law and made it article 10 of the 1926 Family Code, they completely overlooked the effect of the change on article 106 and left it unchanged as article 13 in the then new 1926 Code.[34/]

31/ A. I. Aliakrinskii, Brak, semia i opeka 53 (Moskva, Tekhnika Upravlenia, 1929).

32/ Id., and A. S. Genkin, et al., Kodeks zakonov o brake, seme i opeke 49-51 (Moskva, Iuridicheskoe izdatelstvo, 1929).

33/ Sverdlov, supra note 29, at 108-109.

34/ An ex post facto attempt to give article 13 some plausible meaning was made by the Supreme Court of the RSFSR in 1927 (Decision of Sept. 28, 1927, No. 33271, Civ. Cass. Collegium, Sup. Ct. RSFSR, Sudebnaia Praktika RSFSR, 1927, No. 23, p. 17). The Court explained that the article would make any agreements between husband and wife invalid whereby one spouse, usually the husband, would attempt to take advantage of the other spouse. As suggested by Pergament (supra note 29, at 396), such an attempt could be made to restrict [continued]

But contrary to the intended mandatory effect of article 10, there is reason to believe that immediately after the enactment of the new Family Code in 1926, article 13 may have been understood to give spouses the right to divide their community property during marriage, so that their property relationship would be governed by the principle of separation of property as before.[35/] Such an explanation of the meaning of article 13 appears logical in view of its retention in the new Family Code. This result, however, was not intended by the Soviet government, and it was understood that article 13 did not have any meaning except to attest to the equality of the husband and wife.

The Soviet marital property law was based on the above provisions for many years without any legislative modification until it was further developed by the all-union legislation of 1968[36/] and by the new Family Code of 1969.[37/]

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the right to alimony referred to in articles 14-16 of the Family Code. This explanation does not, however, appear convincing in view of the provisions of articles 14-16 to the effect that any decision as to alimony has to be made by the court on the strength of these very articles, the provisions of which could not be modified by agreement of the spouses.

35/ N. Vavin, "Die vermögensrechtlichen Beziehungen der Ehegatten nach den neuen Ehegesetzbüchern der RSFSR, der UkrSSR, and der WeissrSSR," 2 Zeitschrift für Ostrecht, at 721, 750-751 (1928).

36/ Law of June 27, 1968, on Approval of the Fundamentals of Legislation of the USSR and the Union Republics on Marriage and the Family. Gazette of the USSR Supreme Soviet, 1968, No. 39, p. 353.

37/ Code on Marriage and the Family of the RSFSR of July 30, 1969.

B. Czechoslovakia

The community property system was introduced in Czechoslovakia in 1949 after the Communist Party seized power. The new Family Law was enacted in the wave of legislation changing a democratic system founded on liberty of the individual into a Communist system of government. Through the new legislation, the entire family law which previously formed part of the Civil Code was removed from the Code and was set up as an independent branch of the law. The reason given for the change was that in the "bourgeois" legal order which found expression in the Civil Code, family law was a part of the civil law because it was property oriented and was therefore rightly regulated in the Civil Code. In the socialist system, on the other hand, where family relations were founded on mutual love and affection and not on property, family law was an independent branch of the law and could not form part of the civil law. The line of reasoning runs as follows: In a capitalist society, the bourgeoisie owns nearly all the means of production and the individual ownership of property and its protection is the cornerstone of its civil law. Under these circumstances, the family becomes a unit serving the material interests of its members. Any relations based on love and affection are only marginal in view of the economic function of the family. Family law is regulated in the Civil Code and deals chiefly with property rights of the spouses, like marriage contracts, dowry, etc. Marriage becomes thus a means of hoarding wealth and unearned profits. In a socialist society where all means of production are in socialist ownership, the family is relieved of the typical bourgeois property aspects. There is no marriage contract and no dowry. The purpose of

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38/ Family Law, Act No. 265 of December 7, 1949, Collection of Laws.

the family is the raising of children. It is a unit where all its members help each other materially and morally. Marriage and family are founded on love and affection and not on property rights.[39/]

The Communist Party of Czechoslovakia thus adopted the Soviet approach as founded on the Soviet Family Code of 1926. As a matter of principle, family law became a separate branch of the law independent of the Civil Code to give effect to the victory of Communism over the "bourgeoisie." As to its contents, the Family Law of 1949 reproduced the existing Soviet legislation, doctrine, and jurisprudence as it stood at that time and gave it statutory expression. The Law did not display any originality but contented itself with a true and faithful reproduction of the letter and the spirit of the Soviet marital property law. A wholesale adoption of the Soviet rules at that time was no surprise. Even if the Communist Party of Czechoslovakia had had any ideas of its own, any legislation that attempted a display of originality could have been taken in Moscow for revisionism.

The provisions of the Family Law dealing with marital property appeared under the rights and duties of the spouses in articles 22-29. According to these provisions, community property of the spouses was formed by any goods acquired by either spouse during marriage with the exception of property acquired by gift or inheritance and with the further exception of items of personal use and those acquired in the exercise of the calling of each spouse. The individual was entitled to the management of community property on his own except in matters exceeding the framework of day-to-day management, in which case the consent of the other spouse was required. Community property answered

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39/ Štěpina, supra note 7, at 7-11.

for debts incurred by either spouse individually or by both spouses jointly. Accordingly, community property was dissolved at the termination of the marriage by death or divorce and for good reasons could also be dissolved by the decision of a court. Upon the dissolution of community property, the rules of co-ownership in the Civil Code applied to its distribution. The shares of the spouses were equal. They had to receive compensation for what they expended on community property from their separate funds and had to replace what was expended from community property on their separate property. Upon dissolution of the marriage by divorce, the share of the guilty spouse could be reduced if he had not adequately contributed to its acquisition. If both spouses were guilty in the divorce, their shares were adjusted in proportion to their contribution to the community property.

The spouses were allowed to make their own arrangements concerning the scope, management, and the beginning of operation of community property but any such agreement had to be recorded to be effective.

With respect to the scope and management of community property, the spouses could have enlarged such provisions to include all separate property and to provide for the joint management of both spouses. They could also restrict such provisions and exclude some items from community property, but they were not allowed to convert community property into separate property in its entirety. There always had to be some community property, and a spouse could be excluded from the management of community property.

With respect to the beginning of the operation of community property, the spouses could agree that the operation of community property would begin only at a later date, e.g., at the time of the dissolution of the marriage. Such an agreement allowed the spouses to exclude the application of the law

of community property from their marriage contract. In this case, the property of the spouses which would have been community property upon the celebration of their marriage would become community property only at the death of one of the spouses or at the time of dissolution of the marriage by divorce.[40/] These rules on agreements between spouses constituted the only deviation from the existing practice in the Soviet Union where the spouses are not allowed to modify the scope and the operation of community property.

These provisions applied in Czechoslovakia until April 1, 1964, when the subject was newly regulated. Yet the gist of the law as it appears in the above provisions remained and continues in effect as rearranged.

IV. The present system of marital property in Czechoslovakia and in the Soviet Union

A. Czechoslovakia

1. The new Family Code

As of April 1, 1964, a new Family Code[41/] as well as a new Civil Code[42/] went into effect in Czechoslovakia. This arrangement allowed the draftsmen to consider family law in conjunction with the provisions of the civil law. Although they insisted on the separate presentation of family law apart from the civil law, they fully realized the interrelationship, and the Family Code included a provision making the Civil Code applicable to family relations

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40/ Family Law, art. 29; Štěpina, supra note 7, at 47-49.

41/ Family Code, Act No. 94 of December 4, 1963, Collection of Laws. It entered in force as of April 1, 1964.

42/ Civil Code, Act No. 40 of February 26, 1964, Collection of Laws. It entered in force as of April 1, 1964.

so long as they were not covered in the Family Code.[43/] More significantly, all provisions concerning marital property were removed from the Family Code and returned to the Civil Code. As far as arrangement of the materials and form is concerned, the present approach differs very little from the treatment of the subject prior to the Communist regime. The assertion that marriage under "bourgeois capitalism" was property oriented and therefore regulated in the Civil Code, whereas under "socialism" family relations were based on mutual love and affection and were regulated in the Family Code, did not seem to matter any more.[44/]

2. Community and separate property of spouses

The Civil Code deals with marital property of spouses in articles 143-151, 175-178, and 214-216. The most important provisions appear in articles 143-151 as follows:

The marriage automatically forms a community of property which is termed "joint property of husband and wife." It comprises everything that may be the subject of personal ownership[45/] and was acquired by either spouse during marriage with the exception of things acquired by gift or inheritance and things which, by their nature, serve the personal need or are used in the exercise of the calling or profession of one of them. These later items may constitute the separate property of each spouse.

43/ Family C., art. 104.

44/ See sec. III.B. above.

45/ A person may own articles of personal use, a one family home not exceeding 120 square meters of living space, and one weekend home (Civ. C., arts. 127-129). Land may not be privately owned. The house owner has only the use of the land on which it stands (Civ. C., art. 198).

These provisions of the Civil Code are mandatory and may not be modified by the spouses. In fact, the law does not provide for any marriage contracts or agreements whereby the spouses can modify the mandates of the law. Of special note is the point that they cannot distribute community property among themselves during marriage.[46/] The regime of community property continues even should the spouses actually separate and not live in a common household.[47/] The spouses are thus bound by the law as declared in the Civil Code concerning their separate and community property. The provisions of article 29 of the Family Law of 1949 were not carried over into the new Civil Code and were completely abandoned. The Czechoslovak law on the subject thus fully conforms to the Soviet law of marital property which does not allow the spouses to modify the provisions of the law of community property in any way.

The law also favors community property over separate property in borderline cases. Community property comprises not only the wages and salaries of both spouses,[48/] but also any winnings in a lottery, raffle, or anything acquired by similar means by one spouse, and all income, produce, or accretion of separate property of either spouse.[49/] Royalties from copyright paid during the marriage also fall into community property as well as any payments obtained as a reward for suggestions for improvement of any kind in the line of production or administration.[50/] Property which one spouse acquired by his own work while the

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46/ Sup. Ct. Czechosl., Prz 51/65, R 70/1965, pp. 134-135.

47/ Id., 5 Cz 30/67, R 104/1967.

48/ Sup. Ct., Czech S.R., Cpj 86/71, R 42/1972, p. 113.

49/ Id. at 115.

50/ Id. at 114-115.

other spouse was in prison also forms part of the community property and cannot therefore be the object of theft committed by the other spouse upon his return from prison.[51/]

Items of personal use and those used in the exercise of the calling or profession of a spouse are separate property, irrespective of their value. When they are of considerable value, however, and were acquired from community funds, they are considered as such upon the distribution of the community property. Again, items obtained by exchange for those of separate property of a spouse are his separate property, but the acquisition of anything partly through the spouse's separate funds and partly with community funds falls into community property, irrespective of the share of community funds contributed to the acquisition.[52/]

With respect to the use and management of community property, the law provides that such property is used jointly by both spouses. They also jointly bear the cost expended on such items or connected with their use and maintenance.[53/] Acts of ordinary management may be undertaken by either spouse. Those exceeding ordinary management require the agreement of both spouses, otherwise they are invalid. Yet, both spouses can acquire joint and several rights and are jointly and severally liable on all acts concerning community property. So, e.g., a gift by one spouse of a considerable sum of money to his father was held not to fall within ordinary management of community property, and it

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51/ Sup. Ct. Czechosl., 9 Tz 64/68, R 32/1969.

52/ Sup. Ct. Czech S.R., Cpj 86/71, R 42/1972, pp. 122-123.

53/ So if a motorcar forms part of community property, both spouses may use it jointly, and one spouse may not exclude the other from its use. Dist. Ct. Jindrichův Hradec C 32/64, R 42/1964.

required the consent of the other spouse.[54] On the other hand, the use of community property funds to pay the expenses of a child of the marriage was held to be a matter of ordinary management not requiring the consent of the other spouse.[55]

As far as the use of an apartment by the husband and wife is concerned, the law provides that should they jointly or severally, while married, acquire the right to the use of an apartment; the right to the joint use of the apartment by the spouses will automatically arise.[56] If either spouse acquires such right before he enters into the marriage, the right to joint use of the apartment arises upon celebration of the marriage.[57] A similar rule applies to the right to use land on which a family home, a weekend home, or another structure which may be privately owned stands.[58]

Any dispute between spouses concerning their rights and obligations arising from community property will be decided by the court upon the motion of either party.[59] A spouse may go to court not only in case of a dispute but also when the other spouse hinders him in the exercise of his right to use an item of community property.[60]

54/ Sup. Ct. Czech S.R., Cpj 86/71, R 42/1972, p. 125.

55/ Sup. Ct. Czechosl., 4 Cz 10/66, R 46/1966.

56/ Civ. C., art. 175.

57/ Id., art. 176.

58/ Id., art. 214.

59/ Id., art. 146.

60/ Sup. Ct., Czech S.R., Cpj 86/71, R 42/1972, p. 124.

With respect to creditors, a debt incurred by one spouse during marriage may be satisfied from community property.[61] Execution upon community property may be levied on the authority of a personal judgment against one spouse only, and there is no need to obtain judgment against the other spouse.[62] Yet a judgment against one spouse may not be enforced by garnishment of the salary of the other spouse. This rule applies since the right to salary is not an "object" and cannot be a part of community property.[63] A debt incurred by one of the spouses during marriage may be enforced by the judicial sale of items of community property if the marriage has been dissolved and the community property is not yet distributed between the spouses.[64]

3. Dissolution of community property

Community property comes to an end upon the dissolution of the marriage. This occurs upon death, upon the declaration of death, or upon divorce. The court may also dissolve the community property of the spouses for good reasons during the marriage, especially when its continued existence might offend the principles of socialist conduct.[65] This may occur, e.g., when a spouse disposes of community property irresponsibly to the detriment of the other spouse and the children, especially minor children. Community property may also be dissolved by a court order when the spouses separate, do not live in a common household, and do not contribute to the family's well-being.

61/ Civ. C., art. 147.

62/ Sup. Ct. Czechosl., Prz 51/65, R 70/1965, p. 136.

63/ Cir. Ct. Brno, 8 Co 558/65, R 8/1966.

64/ Cir. Ct. Usti nad Labem, 5 Co 620/72, R 58/1973.

65/ Civ. C., art. 148.

Community property is dissolved automatically in accordance with §52(2) of the Penal Code when confiscation of the property of a spouse is decreed in criminal proceedings. The share of community property belonging to that spouse passes to the state.

The spouses have no authority to distribute community property during marriage. This act may be accomplished through a decision of the court. The fact that the spouses have separated is not sufficient. The separation must be permanent, irreversible, and without any hope for reconciliation. Also, the court must find, as a consequence of the separation, that the spouses do not share in the acquisition of community property.[66/]

After the community property has come to an end, it will be distributed either be agreement between the spouses or former spouses, or by a court decision.[67/] If the community property is dissolved by death, no agreement as to its distribution may be made since the share of the decedent descends by the law of succession.[68/] The agreement of distribution may be made only by the spouses or former spouses, and only after dissolution of the community. It may not be made prior to that, especially not prior to the dissolution of the marriage.[69/] Such agreement must deal with the totality of community property and not only with particular items.[70/]

66/ Sup. Ct. Czechosl., Prz 51/65, R 70/1965, p. 139.

67/ Civ. C. art. 149.

68/ Sup. Ct. Czech S.R., Cpj 86/71, R 42/1972, p. 133.

69/ Sup. Ct. Czechosl., Prz 51/65, R 70/1965, p. 140.

70/ Id., 4 Cz 37/68, R 73/1968.

In the distribution, the shares of the spouses are basically equal. At the same time, each spouse can claim compensation for what he expended on community property from his separate property, and he must replace what was expended from community property on his separate property. The interests and needs of minor children are taken into account in the distribution. Special regard is paid concerning the spouse's share in caring for the family, and also, in what proportion he contributed to the acquisition and upkeep of the community property. In determining the proportion of his contribution to the community property, work in caring for the children and the household is given consideration.[71/]

If both spouses are found to have conscientiously performed all their duties in caring for the family and contributing to community property, their shares upon distribution are equal. If a spouse is found to have failed in some respect, his share is reduced in proportion to his failings, and he may even lose all his entitlement if he is found a liability. This principle applies to both settlement in court and to distribution by agreement of the parties,[72/] but the court is not bound by the agreement of the spouses, neither with respect to the extent of community property nor to the method of its distribution.[73/]

A problem often arises concerning the future use of the dwelling occupied by the spouses upon dissolution of the marriage by divorce. Because of an acute housing shortage, the former spouses are often unable to find other

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71/ Civ. C. art. 150.

72/ Sup. Ct. Czechosl., Prz 51/65, R70/1965, p. 141.

73/ Sup. Ct. Czech S.R., Cpj 86/71, R 42/1972, p. 143.

accommodations. The housing shortage under the Communist regime is so acute and permanent that the law had to consider this factor and make rules to decide who would stay in the home and who would have to leave upon dissolution of the marriage. The law provides that should the former spouses fail to agree on the use of the apartment or other dwelling occupied by them during marriage, the court will, upon motion of either of them, terminate their right to its joint use and award its use to one of them. The decision must take into account the interests of minor children.[74/] A similar rule applies to the right to use land on which a family home, a weekend home, or another structure which may be privately owned stands.[75/]

Distribution of community property is made according to the day on which the marriage was dissolved. Consequently, only property in existence on that day is subject to distribution.[76/] Also, any valuation is made by reference to prices current on that day.[77/] In addition, all community property is subject to distribution including the apartment or other dwelling owned or rented by the spouses.[78/]

If the community property of the spouses is dissolved during marriage, it may be restored only by a court order at the request of either one.[79/]

74/ Civ. C., art. 177.

75/ Id., art. 215.

76/ Sup. Ct. Czechosl., 5 Cz 30/67, R 104/1967.

77/ Cir. Ct. Hradec Králové, 5 Co 325/69, R 21/1970.

78/ Sup. Ct. Czech S.R., Cpj 86/71, R 42/1972, p. 138; Sup. Ct. Czechosl., 4 Cz 150/65, R 19/1966.

79/ Civ. C., art. 151.

Unless this rule is followed, all property relations of the spouses are governed by rules of separation of property. This occurrence is, of course, very rare. But should the community property regime be restored, it affects only property acquired by the spouses from the day on which the court order becomes effective and not any property already held by the spouses.[80/]

B. Soviet Union

1. The new Family Code

The Soviet Constitution of 1936 invested the organs of state power with the authority to determine the principles of legislation concerning marriage and the family.[81/] The central authorities of the Soviet Union did not make use of this authority until 1968, when such principles were in fact enacted,[82/] and the enactment ordered the several Soviet republics to bring their provisions on marriage and family into conformity with these principles.[83/] The Russian Soviet Federated Socialist Republic enacted its Family Code embodying the Fundamentals of Legislation of the USSR and the Union Republics on

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80/ Sup. Ct. Czech S.R., Cpj 86/71, R 42/1972, pp. 128-129.

81/ Constitution (Fundamental Law) of the USSR of December 6, 1936, as amended through June 1, 1949 (New York, American Russian Institute, 1950), art. 14(w).

82/ Law of June 27, 1968, concerning Approval of the Fundamentals of Legislation of the USSR and the Union Republics on Marriage and the Family. Gazette of the Supreme Soviet of the USSR, 1968, No. 39, p. 353.

83/ Id. By provisions of art. 1, of the Law Concerning Approval, the Fundamentals entered into effect as of October 1, 1968, and by provisions of art. 8 thereof, the Union Republics were required to bring their legislation in conformity with the said Fundamentals.

Marriage and the Family by the Law of July 30, 1969, and the Family Code became effective on November 1, 1969.[84/]

The Fundamentals of Legislation deals with the property of the spouses in article 12. Article 12 fully confirmed the existing law of marital property and enlarged the scope of article 10 of the Family Code of 1926 by also including matters previously covered by legal doctrine and judicial pronouncements. The change limited itself to form, and no noticeable change occurred in the substance. Of special interest is the principle of equality of the spouses which has always been stressed in Soviet legal writing and judicial decisions. The existing practice is illustrated by the fact that the Fundamentals of Legislation directly states that upon division of community property the shares of the husband and the wife are deemed to be equal, but that the court may depart from the principle of equality of the shares in special cases.[85/] Such practices arose immediately after the enactment of article 10 of the Family Code of 1926, which provided that the respective shares are determined by the court.[86/]

2. Legislative consolidation of existing jurisprudence

The Family Code of 1969 deals with the property relations of the spouses in articles 20-23 of chapter 4, entitled "The rights and duties of the

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84/ Ministerstvo Iustitsii RSFSR, Kodeks o Brake i Seme RSFSR 3 (Moskva, Iuridicheskaia Literatura, 1975).

85/ Decision of Aug. 17, 1927, No. 34333, Civ. Collegium, Sup. Ct. RSFSR, Sudebnaia Praktika RSFSR, 1927, No. 20, p. 9; Pergament, supra note 29, at 393.

86/ Supra p. 18.

spouses." The provisions of article 12 of the Soviet Fundamentals of Legislation are reproduced word for word. In addition, the Family Code of 1969 added further provisions that were, prior to its enactment, well established in legal doctrine and judicial pronouncements. The whole process can be characterized as one of legislative consolidation of existing jurisprudence. Article 10 of the Family Code of 1926 was first supplemented by the provisions of article 12 of the Fundamentals of Legislation and then by additional provisions appearing in articles 20-23 of the Family Code of 1969. A single article in the Family Code of 1926 was expanded to four articles in the Family Code of 1969.[87/] Article 13 of the Family Code of 1926 did not add anything to the provisions of article 10 and was dropped. This article is not mentioned in the Fundamentals of Legislation or in the Family Code of 1969.[88/]

Some rules now appear in the Family Code of 1969 which were not included in the Family Code of 1926 and which also are not mentioned in the Fundamentals of Legislation of 1968. For the most part these rules deal with the division of community property, of items of personal use of the spouses, of valuables within the framework of the rule which permits separate property to become community property; and with the liability of the spouses for debts. All these topics were fully treated in legal doctrine and judicial pronouncements on the basis of the provisions of article 10 of the Family Code of 1926, and the rules so established were consolidated in the present Family Code.

87/ The fifth article dealing with the topic is art. 24. It provides for the application of arts. 20-23 to personal property of spouses and members of a collective farm household.

88/ A provision similar to art. 13 of the Family Code of 1926 has been retained in art. 27 of the Ukrainian Family Code of 1969.

For instance, the rule in section 2 of article 21, which allows the court to equalize the shares in community property by means of a monetary compensation, was current in judicial practice within the framework of division of property under the operation of article 10 of the Family Code of 1926.[89/]

The rule of section 2 of article 22, with respect to valuables and other luxury items which form part of community property of the spouses although they are used by only one spouse, like precious stones, jewelry, etc., was well established immediately after the enactment of the Family Code of 1926.[90/] Similarly, the rule in section 3 of article 22, which provides for separate property to become community property upon its improvement during marriage from joint funds, was well established in 1947.[91/]

The rule of section 1 of article 23 as to the liability of community property for the debts of the spouses dates from the operation of the Family Code of 1926. As established by decisions of courts in 1927, claims against a spouse would bind his separate property as well as the community property of both spouses.[92/] Since both spouses were deemed to have had the benefit of the property or value which entered the community property, such

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89/ This appears, e.g., from the decision of the Supreme Court of the USSR on division of community property. Biulleten' Verkhovnogo Suda SSSR, 1967, No. 8, str. 4.

90/ Decision of Aug. 4, 1928, No. 33512, Civ. Cass. Collegium, Sup. Ct. RSFSR, Sudebnaia Praktika RSFSR, 1928, No. 23, p. 8.

91/ Decision No. 476, Civ. Collegium, Sup. Ct. USSR, Decisions, Sup. Ct. USSR, 1947, issue VII/XLI, p. 23.

92/ Decision No. 31368, Civ. Cass. Collegium, RSFSR, Note in Sudebnaia Praktika RSFSR, 1927, No. 12, p. 12; Decision No. 35549, Civ. Cass. Collegium, Sup. Ct. RSFSR, Sudebnaia Praktika RSFSR, 1928, No. 5, p. 9.

property would also have to answer for such debts. This rule was, however, modified by a decision of the Plenum of the Supreme Court of the USSR,[93] to the effect that debts incurred by one spouse could be satisfied only from his separate property or from his share in the community property but not from the share in the community property of the other spouse. If both spouses incurred the obligation, they would answer with their separate as well as with their community property.

Also, the rule of section 2 of article 23 was established in Soviet jurisprudence as early as 1927.[94] Such claims for damages originating in a criminal offense could be satisfied from the community property if it was enhanced by the proceeds of the criminal act.

3. Jurisprudence and the new Family Code

The Family Code of 1969 thus enlarged considerably the previously existing statutory provisions concerning marital property. Yet, its provisions are not exhaustive concerning the legal doctrine and jurisprudence on the subject. Topics still remain which even the present statutory regulations do not specifically consider. These regulations are left tacitly without any change since they were established by prior jurisprudence. The more important rules concern savings accounts and agreements between spouses.

As to savings accounts, the rule was established under the operation of article 10 of the Family Code of 1926 that deposits in savings banks in the

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93/ Decision of March 19, 1948, No. 6/5/u, Decisions, Sup. Ct. USSR, 1948, Part 3, p. 6.

94/ Decision of Oct. 10, 1927, No. 33964, Civ. Cass. Collegium, Sup. Ct. RSFSR, Sudebnaia Praktika RSFSR, 1927, No. 21, p. 13; Pergament, supra note 29, at 393.

name of one of the spouses remained the separate property of that spouse, regardless of whether they were made before the marriage or during the marriage.[95] Such deposits could not be included in the partition of community property upon the dissolution of the marriage. This rule was changed on the authority of the Fundamentals of Civil Legislation of the USSR which entered into operation on December 8, 1961.[96] Article 87 provides for the partition of money in a savings account which was made during the marriage and which the courts find to constitute community property of the spouses.[97] The petition for partition may be made only by the other spouse, not by a third party. Furthermore the marriage must be properly registered,[98] and the court must find that the money in the account constitutes community property of the spouses.[99] This

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95/ Decision of Jan. 29, 1942, No. 3/6/u, Decisions, Plenum, Sup. Ct. USSR, 1942, No. 23, p. 18; Pergament, supra note 29, at 394; Sedugin, at 65.

96/ Fundamentals of Civil Legislation of the USSR and the Union Republics, approved by the Supreme Soviet of the USSR, December 8, 1961 (Moscow, Progress Publishers, 1968), p. 65.

97/ Sedugin, supra note 29, at 65; E. M. Vorozheikin, Kommentarii k Kodeksu o brake i seme RSFRS, S. N. Bratus, P. E. Orlovskii, red. (Moskva, Iuridicheskaia Literatura, 1971), str. 51.

98/ Vorozheikin, supra note 97, at 50-51; P. I. Sedugin, Vklady grazhdan v kreditnykh uchrezhdeniakh (Moskva, Iuridicheskaia Literatura, 1964), str. 46. Sovetskaia Iustitsia, 1965, No. 24, p. 25. A man and a woman living together but but not in a properly registered marriage can petition for partition of a savings account only on the ground that one of them concealed from the other the fact that his properly registered marriage to another person was still subsistent.

99/ The court will consider the proportions of interest of each spouse in the account in accordance with the provisions of article 21 of the Family Code. Biulleten' Verkhovnogo Suda SSSR, 1963, No. 5, str. 8; Sotsialisticheskaia Zakonnost, 1969, No. 3, str. 85; Vorozheikin, supra note 97, at 51-53; Sedugin, supra note 98, at 46.

rule is necessary because there are no joint accounts in the Soviet Union, and savings accounts are opened in the name of individual persons.[100/]

As to agreements between the spouses, the power to enter into them derives from articles 20-23 of the Family Code, but since an individual in the Soviet Union is restricted to ownership of items of personal use, there is no pressing need for any such agreements. Those made are rather understandings between spouses as to how to support themselves and the family and how to handle their expenses. The only agreements that are likely to be made concern the division of community property upon divorce and the support of the former spouse in case of need. There are no marriage contracts since the spouses own nothing of value and consequently there is no point in making a contract.[101/]

V. Comparisons and conclusions

The present laws of marital property in Czechoslovakia and in the Soviet Union are virtually identical. There are some differences in form but as far as the contents of the laws are concerned, the spirit of the Soviet marital property law was faithfully reproduced in Czechoslovakia. The Soviet law of marital property was developed by judicial pronouncements based on article 10 of the Family Code of 1926, and is applied today with very minor modifications in the form that developed in the late 1920s and 1930s. In 1949 the Czechoslovak marital property law adopted the Soviet legal provisions

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100/ Vorozheikin, supra note 97, at 50; Sedugin, supra note 98, at 45.

101/ The subject is discussed at length in G. K. Matveev, Sovetskoe semeinoe pravo 127-142 (Moskva, Iuridicheskaia Literatura, 1978).

as they stood. In effect Czechoslovakia borrowed a system which had already been tested in actual practice for over twenty years. Further developments in the area of marital property law are negligible both in the Soviet Union and in Czechoslovakia. The fact that the Czechoslovak marital property law is embodied in the Civil Code is, as mentioned above, purely a matter of form. The substance and the application of the law did not change. Other differences are linguistic and dissipate under scrutiny. This seems to be the case, e.g., in treating the problem of family quarters upon divorce, or that of liability of community property for debts incurred by individual spouses during marriage. The fundamental proposition is the same under both laws, namely, the courts cannot deal with the problem of housing which is practically insolvable in both countries, and as far as liability for debts is concerned, the community property of the spouses is liable, but the court considers the interests of the family upon dissolution of community property.

It appears to be quite certain that the community property laws used in both Czechoslovakia and Russia prior to the introduction of the present system fostered by the Communist Party were considerably superior to that of Communist creation. The former Czechoslovak and Russian marital property laws were individualistic and were founded on the idea of individual freedom and liberty. They allowed for a separation of marital property, but the spouses were free to make their own arrangements as a matter of daily routine or by marriage contracts. Freedom is impossible under the forced introduction of a community property system, which is compulsory and cannot be modified by the spouses. It is a general principle of policy in the legislative regulation of marital property for the state not to overly interfere in the relations of husband and wife, and in any event, to leave the spouses

the freedom to regulate their property relations as they think will best suit them within the framework of several alternatives provided by law. This is exactly what distinguishes individualism and freedom from collectivism and state compulsion. The Soviet brand of community property was not so much introduced in the Soviet orbit in order to protect the wife as to expand collectivist ideas into the sphere of marital property. Compared to the marital property law as it stood prior to the forcible introduction of the Communist type of community property, the present Communist system is retrograde, and to use their own terminology, reactionary.

Modern community property systems originated in Spain and in France and are extensively used in both these countries.[102/] Their objective has been the protection of the wife's interests both during and upon dissolution of the marriage. Both systems allow the spouses to make their own arrangements concerning marital property by a marriage contract.[103/] If the spouses make no such contract, their marital property will be governed by the system of community property.[104/] But the spouses are not bound to continue under such a system and may make another arrangement if they please.[105/] They are free

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102/ Community property is reputed to be of Germanic origin. A survey of authorities concerning the origin of community property appears in 25 Louisiana Law Review 78-90 (1964).

103/ C. Civ., art. 1387 (Fr.); C. Civ., art. 1315 (Sp.).

104/ C. Civ., art. 1400 (Fr.); C. Civ., art. 1315 (Sp.).

105/ In French law, the spouses may modify their existing regime of marital property after two years, C. Civ., art. 1397 (Fr.); in Spanish law, the modification can be made at any time, C. Civ., art. 1320 (Sp.).

to provide for a system of separation of property or for any other arrangement of their choice.[106/]

It is in this respect that the Communist law fails. No freedom of choice is given to the spouses in Soviet and Czechoslovak law, and they are bound by the rule of uniformity. Only the community property system is permitted.

But within the community property system, there is a large degree of similarity between the Spanish and French system on the one hand and the Soviet and Czechoslovak on the other. The community property consists of what has been acquired during marriage as well as the income and produce of the separate property.[107/] Separate property is that held by the spouses prior to their marriage, and that acquired later by gift or inheritance.[108/]

The major difference consists, of course, in the quantum of the community property held by the spouses. The true nature of the Soviet and Czechoslovak law of community property appears in its proper perspective when one realizes that in these countries a person may own only items of personal use and may not own land.[109/]

In the USSR, private ownership by citizens is regulated in articles 105-115 of the Civil Code (Civ. C. RSFSR). Citizens may own only items of

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106/ The French Civil Code carries several schemes of marital property of the spouses which they can select as a basis for their arrangements, or they can make their own provisions. C. Civ., arts. 1387-1581 (Fr.).

107/ C. Civ., art. 1401 (Sp.); C. Civ., art. 1401 (Fr.); Family C., art. 20 (RSFSR); Civ. C., art 143 (Czechosl.).

108/ C. Civ., arts. 1396, 1398 (Sp.); C. Civ., arts. 1404-1405 (Fr.); Family C., art. 22 (RSFSR); Civ. C., art. 143 (Czechosl.).

109/ Supra notes 45 and 101.

personal use, and one home. The living space may not exceed a total of 60 square meters. The situation in Czechoslovakia is somewhat better since citizens may own a family home of up to 120 square meters. Russians may also own one weekend home and an automobile, but the property may not be used to produce income which is termed unearned income.[110] If it is so used, it will be confiscated by the mandate of article 111 of the RSFSR Civil Code. The subject is dealt with in two separate decisions of the Presidium of the Supreme Soviet of the RSFSR, one of July 26, 1962, concerning the confiscation of houses, weekend homes, and other buildings built or acquired from unearned income;[111] and the other of September 29, 1963, concerning the confiscation of automobiles owned by citizens whose houses, weekend homes and other structures built or acquired from unearned income have been confiscated.[112] The second decision was necessary since upon confiscation of a home, the authorities had no power to confiscate an automobile which a fortiori was also acquired from unearned income. Unearned income is not defined in any statute, and it is left entirely to the authorities to decide which is unearned and which is properly earned. Earned income means an income earned as wages or salary from an employer who is exclusively the government or a public enterprise. The measures are aimed at earnings derived from after-hours work by such persons as businessmen who would do repair work or other tasks on their own account. There is unearned income whenever a person

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110/ Fundamentals of Civil Legislation, art. 25, supra note 96.

111/ Gazette of the Supreme Soviet of the RSFSR, No. 30/464 of 1962, p. 477.

112/ Id., at No. 39/699 of 1963, p. 785.

acquires an automobile, a house or a weekend house, and it appears that he did not purchase the house with his earned income. Such property is subject to confiscation.[113] But, even if a person acquires a second home with properly earned income, he must dispose of one of them within one year by sale or by gift. If he does not do so, even if he cannot find a buyer, the home will be confiscated without any compensation whatsoever. The same applies to only one home or an apartment if it exceeds the allowed 60 square meters of space.[114]

The importance of being able to select a community or a separation of property system decreases with the quantum of the property owned, and when all the ownership is reduced to the bare minimum required for one's existence, it matters little what the niceties of the system are. As a contemporary Soviet authority on family law put it, "there are no marriage contracts in Soviet law since there is nothing the spouses could contract about."[115]

The repeated theme of the Communist law of marital property stressing the equality of husband and wife[116] must be seen in its proper perspective. The Soviet and Czechoslovak law of marital property may have achieved equality between the spouses, but it is restricted to what a person may own. Equality of husband and wife as it is presented in the French Civil Code, articles 212-226, is much more meaningful.

113/ R. O. Khalfina, Pravo lichnoi sobstvennosti 107-111 (Moskva, Nauka, 1964); S. N. Bratus, O.S. Ioffe, Grazhdanskoe pravo 66 (Moskva, Znanie, 1967); O. A. Krasavchikov, Sovetskoe grazhdanskoe pravo 366-368 (Moskva, "Visshaya Shkola," 1968-69).

114/ Civ. C., art. 107, RSFSR.

115/ Matveev, supra note 101, at 142.

116/ Pergament, supra note 29, at 365; Matveev, supra note 101, at 141.

The Soviet and Czechoslovak law of marital property does not fare any better when compared with California and Texas law. Although the concept of community property was introduced to the United States through French and Spanish law,[117] the parent laws have been surpassed in some respects, notably in regard to the equality of the husband and the wife. In both California and Texas the spouses are deemed to fall within the regime of community property upon their marriage, unless they make other disposition in a marriage contract. They are free to make their own arrangements and can select separation of property or any other system and can modify their agreements at any time.[118] Separate property consists of property owned before the marriage and that was acquired during marriage by gift, devise, descent, or as recovery for personal injuries. Community property consists of property, other than separate property, acquired by either spouse during the marriage.[119] The spouses are absolutely equal in their mutual relations dealing with separate and community property and in dealings with each other and with third parties.[120] They enjoy an equality in the ownership and in the management of real and personal property without any regard for the extent or the value. Compared with the California and Texas law, equality as construed in the Soviet and Czechoslovak law of marital property is an institution devoid of contents. The Communist equality in

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117/ See p. 1.

118/ Cal. Civ. C. §§ 5104, 5110, 5133 (West); Tex. Fam. C. Ann. §§ 5.01 5.41, 5.42 (Vernon).

119/ Cal. Civ. C. §§ 5107, 1508, 5110 (West); Tex. Fam. C. Ann. § 5.01 (Vernon).

120/ Cal. Civ. C. §§ 5100, 5103, 5104, 5105, 5116, 5117, 5125, 5126, 5127, 5131, 5132 (West); Tex. Fam. C. §§ 5.21, 5.22, 5.24, 5.61 (Vernon).

the sphere of marital property is actually one of lack of property, and the authorities strive to preserve this lack of property.

The fundamental principles of Soviet marital property law were set by the Family Code of 1926 and have been applied ever since without any substantial change. The same law was introduced in Czechoslovakia subsequent to the seizure of power there by the Communist Party in 1948. All further developments pertain only to details, interpretation, and application of the fundamental principles. The law of marital property in both the Soviet Union and in Czechoslovakia is founded on the Communist political and economic outlook. Without a change in this philosophy, no fundamental change in the law can be expected in the future.

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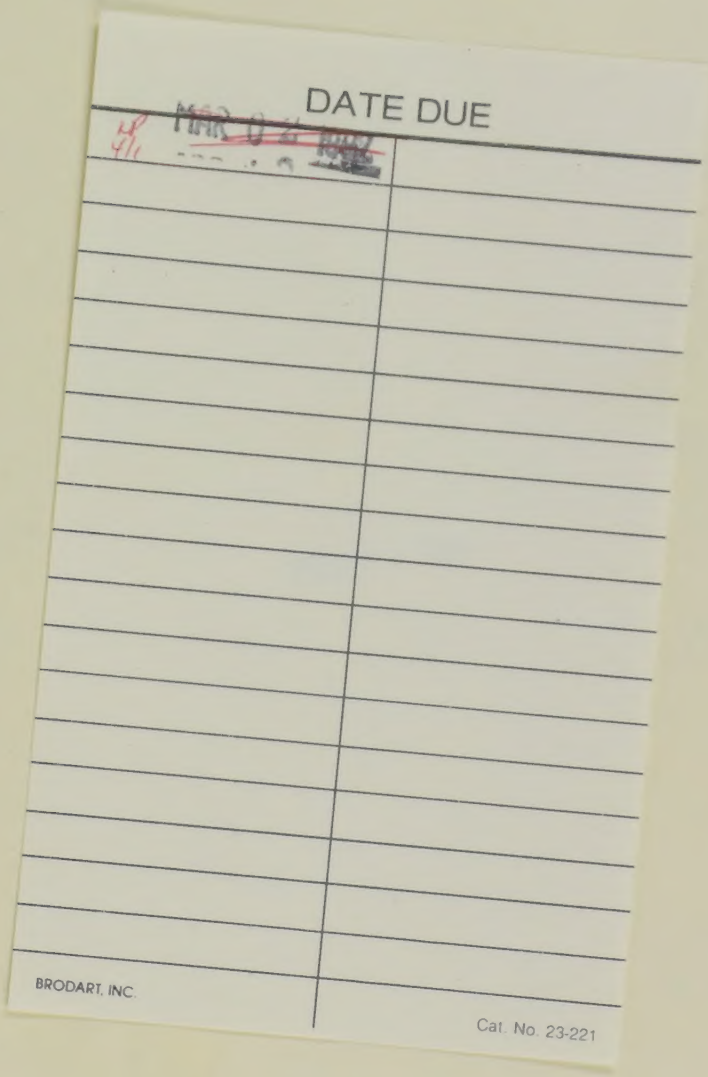
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